Supreme Court, U.S.
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No. 14-940

IN THE
Supreme Court of the United States

SUE EVENWEL, ET AL.,
Appellants,

v.

GREG ABBOTT, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF APPELLANTS

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INTERESTS OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Amici believe that the decision by the U.S. District Court for the Western District of Texas (the "Western District") raises an important issue of constitutional law concerning reapportionment and individual voting rights which should be heard by this Court. In particular, *amici* are concerned that the Western District's ruling will allow the State of

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[1] Pursuant to Supreme Court Rules 37.2 and 37.6, *amici* state that all parties received timely notice of the intent to file this brief, and all parties granted consent. In addition, no counsel for a party authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

Texas intentionally to assign an unequal value to the votes of different citizens. Such a result denies Texas citizens the "one person, one vote" guarantee of the Equal Protection Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1. *Amici* are troubled by the fact that Texas is devaluing the votes of certain of its citizens by improperly including noncitizen nonvoters when determining the "equal population" of legislative districts. Under federal law and the laws of all 50 states, only citizens may vote in federal elections.[2] Texas' scheme to give weight to nonvoting noncitizens along with lawful voters is contrary to the principles embodied in citizen voting laws.

SUMMARY OF ARGUMENT

The issue in this appeal is justiciable and is not reserved to the political branches. As was true with the first generation of apportionment cases resolved in the 1960s, the deliberate malapportionment of citizens at issue in this case infringes voting rights in a way that, by its nature, resists correction by the ordinary operation of democratic processes. The intervention of this Court is essential to uphold Appellants' constitutional rights.

This appeal presents a substantial and unsettled question regarding the appropriate metric to use

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[2] *See generally* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1275-1276 (Fall 2012) ("Today, every state prohibits noncitizens from voting in federal elections. Federal law, too, prohibits aliens from voting in federal elections.").

when applying the fundamental constitutional principle of "one person, one vote." This Court's guidance is necessary to prevent the tactical, partisan use of citizen malapportionment to dilute the votes of American citizens.

For these and other reasons, *amici* urge the Court to note probable jurisdiction and set the case for oral argument.

REASONS FOR NOTING PROBABLE JURISDICTION

I. CITIZEN MALAPPORTIONMENT RAISES A JUSTICIABLE ISSUE BECAUSE IT INFLICTS A HARM THAT CANNOT BE REMEDIED BY THE POLITICAL PROCESS.

This appeal presents the Court with an opportunity to close a longstanding loophole to the "one person, one vote" principle first articulated in *Baker v. Carr*, 369 U.S. 186 (1962). Closing this loophole will prevent state legislators from deliberately disenfranchising their own citizens by a method exemplified by Texas' current Senate district plan. This method involves holding total district populations constant while varying the number of age-eligible or registered voters. More simply put, it entails the strategic placement of noncitizen populations in certain districts in order to dilute the voting power of citizen populations. This practice violates the Equal Protection Clause and this Court's precedent, and should be prohibited.

District malapportionment of any kind falls into a category of electoral violations that are justiciable precisely because they cannot be remedied by the ordinary workings of the democratic process. This Court recognized this point when it first ventured into the "political thicket" to address the equal protection implications of voting districts. *See Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

A long line of apportionment cases explicitly identified the lack of political remedies as justification for the Court's intervention. Justice Clark, concurring in *Baker v. Carr*, explained that

> the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination." Tennessee has no initiative and referendum. . . . The majority of the voters have been caught up in a legislative strait jacket. . . . [T]he legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless.

369 U.S. 186, 258-59 (1962) (Clark, J. concurring); *see Reynolds*, 377 U.S. at 553-54 ("No effective political remedy to obtain relief against the alleged

malapportionment of the Alabama Legislature appears to have been available. No initiative procedure exists" and constitutional amendments require "three-fifths of the members of both houses of the legislature"); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 651-52 (1964) ("No adequate political remedy to obtain relief against alleged legislative malapportionment appears to exist in New York. No initiative procedure exists," and existing malapportionment would affect elections to any state constitutional convention); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 669-70 (1964) (several reapportionment bills "failed to pass because of opposition by legislators from the less populous counties," a constitutional amendment was "unavailable, as a practical matter" and seats at a constitutional convention "would be based on the allocation of seats in the allegedly malapportioned General Assembly."); *Davis v. Mann*, 377 U.S. 678, 689 (1964) ("No adequate political remedy to obtain legislative reapportionment appears to exist in Virginia. No initiative procedure is provided for under Virginia law."); *Roman v. Sincock*, 377 U.S. 695, 706 (1964) ("repeated attempts to reapportion the legislature or to call a constitutional convention" failed. "[n]o initiative and referendum procedure exists in Delaware," and "two-thirds of both houses of two consecutive state legislatures is required in order to amend the State Constitution."); *see* Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 65, 79 (1962) ("The problem of malapportionment is one which peculiarly fits such a judicial role. For the usual methods by which a

majority can constitutionally gain its ends are blocked.").

The "citizen malapportionment" at issue in this case has the same characteristics as the general malapportionment at issue in *Baker* and its progeny, and judicial intervention is justified here on the same grounds. The creation of districts with massively unequal populations of age-eligible or registered voters (albeit with the same total populations) allows legislators to "weight" the votes of their supporters by placing them in districts with fewer voting citizens. Legislators thereby acquire the undemocratic ability to increase their odds of winning elections *without* having actually to appeal to voters. Indeed, legislators gain the ability to choose themselves, at least to some degree; and they acquire this power at the voters' expense.[3]

Like the first generation of malapportionment claims addressed in *Baker*, citizen

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[3] The pathology and illegitimacy of "self-constitutive" assemblies was discussed in the context of gerrymandering in Daniel D. Polsby and Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 305 (1991) ("The members of a partially self-constituted legislature depend to a degree upon one another rather than upon their constituents for their tenure in office. Whatever 'representation' means, it cannot possibly mean that."). *See also Bush v. Vera*, 517 U.S. 952, 963 (1996) (the result of districts drawn to protect incumbents "seems not one in which the people select their representatives, but in which the representatives have selected the people.") (citation omitted).

malapportionment systematically distorts the outcomes of elections and so is immune to correction through normal democratic processes. Legislators who depend for their electoral success on the "weighted" or "privileged" votes of their specially distributed partisans cannot be expected ever to equalize that distribution.

As was true in Tennessee in 1962 and in Alabama, New York, Maryland, Virginia, Delaware, and other states in 1964, voters in Texas currently have no effective political remedy. Texas has no initiative process.[4] Any proposed amendment to the Texas Constitution requires a legislative referral approved by a supermajority of two-thirds of both houses. TEX. CONST. Art. XVII, § 1. Texas' provision for calling a constitutional convention was repealed in 1999. TEX. CONST. Art. XVII, § 2 (repealed).

This case presents a justiciable question which requires this Court's involvement. As in 1962 and 1964, judicial intervention is necessary to correct an electoral imbalance that will not be fixed by holding elections.

This imbalance inflicts a grave constitutional injury. Texas created districts that are equal in total population but decidedly unequal in citizen

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[4] *See* National Conference of State Legislatures, *Initiative, Referendum and Recall*, available at http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx (visited March 5, 2015); Initiative & Referendum Institute at the University of Southern California, *State I&R*, available at http://www.iandrinstitute.org/statewide_i&r.htm (visited March 5, 2015).

population. As a result, Texas' apportionment effectively gives some of its citizens approximately 1.8 votes while others have only 1 vote. *See* Jurisdictional Statement ("Juris. Stmnt."), No. 14-940 (Feb. 2, 2015) at 9 (showing a maximum voting power discrepancy of 1 to 1.84). The nature of the injury here was well described by this Court on another occasion:

> [I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. . . . Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State.

Reynolds, 377 U.S. at 532-33. As the Court concluded, "[w]eighting the votes of citizens differently, *by any method or means*, merely because

of where they happen to reside, hardly seems justifiable." *Id.* at 533 (emphasis added).

II. CITIZEN MALAPPORTIONMENT PRESENTS A SUBSTANTIAL AND FUNDAMENTAL CONSTITUTIONAL QUESTION WHICH SHOULD BE RESOLVED NOW.

As Appellants have demonstrated, this case presents a substantial question. This Court should note probable jurisdiction and set this case for oral argument. *See* Juris. Stmnt. at 12-16.

Indeed, this case would satisfy even the higher standard used for certiorari. *Id.* at 16-25. Since this Court first considered the issue of the appropriate metric for the "one person, one vote" standard almost 50 years ago, the issue has remained controversial. *See Burns v. Richardson*, 384 U.S. 73 (1966). Subsequent precedent suggests that the issue of the proper population measure has not been clearly resolved. *See Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 58 n.9 (1970); *Chen v. City of Houston*, 532 U.S. 1046, 1047 (2001) (Thomas, J. dissenting from denial of certiorari) ("Having read the Equal Protection Clause to include a 'one-person, one-vote' requirement . . . we have left a critical variable in the requirement undefined. We have never determined the relevant 'population' that States and localities must equally distribute among their districts.").

The Fifth Circuit, while acknowledging that the "propriety under the Equal Protection Clause of using total population rather than a measure of potential voters . . . presents a close question," concluded that, given "the lack of more definitive guidance from the Supreme Court . . . this eminently political question has been left to the political process." *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001); *accord, Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) ("In the absence of a clear pronouncement from the Supreme Court on this issue," North Carolina could choose total population and "the district court should have respected its choice"). By contrast, the Ninth Circuit treated the issue as justiciable but held that the "one person, one vote" principle *requires* the use of total population. *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). Yet Judge Kozinski, in a separate opinion, argued strongly that voter population was the appropriate standard instead. *Id.* at 782 (Kozinski, J., concurring in part and dissenting in part).

This critical issue at the heart of this Court's Equal Protection jurisprudence should be finally and unambiguously resolved. Indeed, this issue is more pressing than it was when *Chen* and *Garza* were decided, given the considerable growth in the noncitizen population.

Noncitizen populations in the U.S. are significantly larger today, especially in Texas. The number of unlawfully present aliens has nearly

tripled in the U.S. since *Garza*, from approximately 3.4 million in 1992 to 11.5 million in 2011.[5] Furthermore, in 1990 there were approximately 11 million total noncitizens living in the U.S. (including both legal residents and unlawfully present) or about 4.4 percent of the U.S. total 1990 population of approximately 248 million.[6] In contrast, by 2012 this figure had doubled to approximately 22 million noncitizens in the U.S.[7] Out of a total 2012 population of 311 million, this means that roughly 7 percent of the modern U.S. population lacks citizenship – or about 1 in 14 people. This is a substantial increase in the past 25 years. Furthermore, it is well established that Texas has one of the highest noncitizen populations in the United States, at 11 percent of its total state

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[5] *Illegal Immigration, Population Estimates in the United States, 1969-2011*, Illegal Immigration Solutions, available at http://immigration.procon.org/view.resource.php?resourceID=000844 (visited March 5, 2015).

[6] Nolan Malone, *et al.*, *The Foreign-Born Population: 2000*, U.S. Census Bureau (Dec. 2003), page 3, Table 1, available at http://www.census.gov/prod/2003pubs/c2kbr-34.pdf (showing noncitizens accounted for 59.5 percent of the United States' total foreign-born population of 19,767,316, which translates as approximately 11,761,553 noncitizens, or about 4.4 of the U.S. total 1990 population of 248,709,873).

[7] Yesenia D. Acosta, Luke J. Larsen, and Elizabeth M. Grieco, *Noncitizens Under Age 35: 2010–2012*, American Community Survey Briefs, p. 2 (Feb. 2014), available at http://www.census.gov/prod/2014pubs/acsbr12-06.pdf.

population – tied for second in the U.S., behind only California.[8]

Accordingly, the opportunity for legislators to resort to the tactical use of noncitizen populations to dilute the voting power of citizens is greater than ever.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court note probable jurisdiction and set this case for oral argument.

Respectfully submitted,

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[8] *See* Henry J. Kaiser Family Foundation, *Population Distribution by Citizenship Status*, available at http://kff.org/other/state-indicator/distribution-by-citizenship-status/ (visited March 5, 2015).